BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of	)	
	)	
JAMES A. KAY, JR.	)	WT Docket No. 94-147
	)	
Licensee of One Hundred Fifty Two Part 90 Licenses in the Los Angeles, California Area	)	

To: The Commission

REPLY OF JAMES A. KAY, JR. TO THE WIRELESS TELECOMMUNICATIONS BUREAU'S EXCEPTIONS AND BRIEF

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Summary

Pursuant to Section 312(d) of the Communications Act, the Bureau has the burden of proceeding and the burden of proof. The Presiding Judge properly concluded that the Bureau failed to carry its burdens. The record of the hearing conclusively demonstrates that, on all issues, there is no basis for license revocation or any other sanction. The evidence adduced at hearing does not reveal any significant transgression by Kay of the Communications Act or of any Commission regulation or policy. Assuming arguendo that Kay may have inadvertently failed to comply with any requirement, the record more than amply demonstrates numerous extenuating circumstances and mitigating factors. All issues were, therefore, properly resolved in Kay's favor. The *Initial Decision* should be affirmed in all respects.

TABLE OF AUTHORITIES

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James A. Kay, Jr. ("Kay"), by his attorneys and pursuant to Section 1.277(c) of the Commission's Rules and Regulations, 47 C.F.R. § 1.263(a) (1998), hereby replies to the *Exceptions and Brief* ("*Exceptions*") submitted by the Wireless Telecommunications Bureau ("Bureau") in response to the *Initial Decision of Chief Administrative Law Judge Joseph Chachkin* ("*Initial Decision*").[1]

I. INTRODUCTION

This proceeding was initiated by the *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture*, 10 FCC Rcd. 2062; 76 RR 2d 1393 (1994) (hereinafter cited as "*HDO*"). In addition to the issues framed in the *HDO*, the so-called "Sobel Issues" were added by *Memorandum Opinion and Order* (98M-15; released February 2, 1998). Two of the designated issues were resolved in Kay's favor by summary decision. *Memorandum Opinion and Order* (FCC 98M-94; released July 15, 1998). The Presiding Judge resolved all of the remaining issues in Kay's favor. The Bureau has not presented any justification for

[1] By *Order* (FCC 99I-21; released October 18, 1999), the date for submission of reply exceptions was extended to November 2, 1999. By *Order* (FCC 99I-19; released October 7, 1999), the page limit for both exceptions and reply exceptions was extended to 30 pages. Concurrently herewith Kay is submitting a motion to strike the Bureau's *Exceptions*, grant of which would render the instant submission moot.

disturbing the findings and conclusions of the Presiding Judge, and the *Initial Decision* should be affirmed.[2]

In accordance with Section 312(d) of the Communications Act, 47 U.S.C. § 312(d), the Bureau had the burdens of proceeding and proof. *HDO* at ¶ 15; *Order* (FCC 98M-30; released March 12, 1998). It was Bureau's exclusive burden to prove, by clear and convincing evidence,[3] the alleged wrongdoing and to justify the severe sanctions sought.[4] The Bureau has been actively investigating Kay on these matters since as early as 1993, and the case was designated for hearing nearly five years ago. The Bureau has enjoyed abundant opportunity to investigate, inspect, depose, interrogate, cross-examine, etc., and has had more than ample opportunity to present evidence and witnesses. Kay need not apologize for insisting that the Bureau be held stringently responsible for meeting its statutorily imposed burdens. The Presiding Judge correctly concluded that the Bureau failed to do so, and a review of the record in this case supports that conclusion.

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[2] The failure of Kay to address any specific argument set forth in the *Exceptions* does not constitute a concession by Kay as to the validity or propriety of the particular position advanced by the Bureau. This reply is limited to the more important aspects of the case.

[3] Kay is a small businessman who depends on his land mobile radio operations as his sole source of livelihood. The "clear and convincing" standard therefore applies. *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240 (D.C. Cir. 1980) (clear and convincing standard of proof applied to FCC revocation proceedings potentially affecting the licensee's livelihood). The Supreme Court decision in *Steadman v. SEC*, 450 U.S. 91 (1981), does not require a different result. *See, e.g., Lewel Broadcasting, Inc.*, 86 FCC 2d 896, 913-914 ¶ 32 (1981) (recognizing, with only a "*cf.*" to *Steadman*, that *Sea Island* "holds that where a loss of livelihood is involved, the revocation of an FCC license must be proved by 'clear and convincing' evidence"); *Silver Star Communications-Albany, Inc.*, 3 FCC Rcd. 6342, 6350 n.18 (recognizing, after *Steadman*, that the clear and convincing standard may be proper in some circumstances); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 n.1 (Scalia, J.) (assuming without deciding, and with only a "*cf.*" to *Steadman*, that the Commission's application of a "clear, precise, and indisputable" standard of proof was valid). Even if the lower "preponderance of the evidence" standard is applied, however, the Bureau still woefully failed to meet its burden.

[4] Kay was not required to prove his innocence, nor was it up to Kay to refute partial, incomplete, and inadequate showings by the Bureau. If the Bureau's evidentiary presentation was lacking in any respect, no adverse inference could be drawn against Kay as the result of any "significant silences". *See WMOZ, Inc.*, 1 RR 2d 801 at ¶ 15 (1964).

II. SECTION 308(b) ISSUE

A. Consideration of the Reasonableness of the 308(b) Letter was Proper.

The Bureau complains that the Presiding Judge improperly characterized the 308(b) letter as an unlawful fishing expedition. *Exceptions* at ¶¶ 9-14. But the real question is not the use of the phrase "fishing expedition." Rather, the Presiding Judge properly engaged in a critical evaluation of the scope and reasonableness of the 308(b) letter itself. If the Bureau seeks total disqualification of Kay and revocation of all of Kay's licenses on the ground that he failed to answer the 308(b) letter, then Kay must be permitted to be heard on the issue of whether the 308(b) letter was proper and reasonable. The Presiding Judge properly heard Kay on this point, and resolved the question in Kay's favor.

The Bureau argues that the Commission had already implicitly considered the propriety of the 308(b) letter by referencing it in the *HDO. Exceptions* at ¶ 10. The Bureau has it backwards—in designating the Section 308(b) issue for an evidentiary hearing, the Commission implicitly approved, if not invited, an examination of the propriety of the 308(b) letter. That Kay failed to provide some of the information sought in the 308(b) letter prior to designation has never been disputed. The Commission must, therefore, have anticipated that the reasonableness of the request itself as well as other possible justifications or extenuating circumstances might be addressed at hearing, and it was entirely proper for the Presiding Judge to consider such matters.

The Commission did not expressly address the propriety of the 308(b) letter when it denied Kay's pre-hearing *Request for Extraordinary Relief* (see *Exceptions* at ¶ 10), and it certainly did not preclude the presentation and consideration of these matters at hearing. The Commission said: "If Kay continues to believe that he is aggrieved based on the allegations that he presented to the Commission on an interlocutory basis, he may raise these arguments if and when he files exceptions to an initial decision." *James A. Kay, Jr.*, 14 FCC Rcd 1294, 1294

(1998). By inviting possible consideration of the matter in exceptions filed *after* hearing, the Commission clearly anticipated and approved consideration of the matter *during* hearing.[5]

Adoption of the Bureau's position would place the target of an investigation in an untenable position. The Bureau is effectively saying that a licensee may be designated for hearing and forced to defend itself against license revocation on the basis of an alleged failure to comply with an informal staff request for information without ever being afforded any opportunity to challenge the propriety, reasonableness, or legality of the information request itself. Prior to designation for hearing, the Bureau either ignored or summarily rejected Kay's legal objections and his pleas that the 308(b) letter be clarified or its scope narrowed. The Bureau arranged for the designation of license revocation proceedings, on an *ex parte* basis and without notice to Kay, based on Kay's alleged violation of Section 308(b). Kay was precluded from having the designation order reconsidered, 47 C.F.R. § 1.106(a)(1), and the Bureau now contends that the reasonableness of the 308(b) letter may not be challenged in the hearing. In the Bureau's absurd view of the world, any informal request for information its staff issues is conclusively presumed to be proper and lawful, and there is never any venue or forum in which the licensee may contend otherwise. Congress certainly did not intend for Section 308(b) to be a blank check that Bureau staff may use to buy its way around compliance with Constitutional due process requirements.

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[5] Moreover, the Commission was addressing an interlocutory matter based solely on written pleadings. The Presiding Judge made his ruling based on a full record, including several days of live sworn testimony and literally hundreds of exhibits, with the benefit of full briefing by the parties, and after ample opportunity for the Bureau to refute Kay's showing of the unreasonableness of the 308(b) letter. For the same reason, the Bureau's contention that previous rulings by the Presiding Judges precludes consideration of the scope and propriety of the 308(b) letter, *Exceptions* at ¶ 11, is without merit. The rulings cited by the Bureau were pre-hearing decisions on various procedural issues. The *Initial Decision*, in contrast, was an ultimate ruling on the merits made after the benefit of a hearing and a full record. A presiding judge is not barred from rendering a proper decision based on the hearing record simply because it potentially conflicts with a pre-hearing interlocutory ruling. Having interlocutory rulings dictate the ultimate findings and conclusions would render the entire hearing process meaningless.

A staff request for information—even one that invokes Section 308(b) of the Act—is subject only to ***voluntary*** compliance unless the Commission invokes formal procedures, *e.g.*, the issuance of a subpoena. In *PTL of Heritage Village Church and Missionary Fellowship, Inc.*, 71 FCC 2d 324, 45 RR 2d 639 (1979) the Commission observed:

> [T]he Commission expects its licensees to cooperate with staff-conducted informal investigations. Sections 403 and 409 of the Act provide the Commission the formal means, *i.e.* subpoena, to obtain books, records and information, but resort to these means in informal investigations has traditionally been unnecessary since most licensees recognize the Commission's authority to inspect such documents. However, when licensees refuse to cooperate in this ***voluntary procedure*** and insist upon formal procedures the Commission will institute a formal proceeding to obtain the information. Under these circumstances, the Commission does not believe its request of licensees to ***voluntarily make available information*** under their control constitutes an unreasonable search under the Fourth Amendment to the Constitution.

Id. at ¶ 12 (emphasis added).

This view is supported by an examination of other provisions of the Communications Act. Section 409(e) confers upon the Commission "the power to require by subpoena ... the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation." 47 U.S.C. § 409(e). But Commission subpoenas are not self-enforcing. Section 409(g) provides that an order compelling compliance with such a subpoena shall issue from an appropriate federal district court. 47 U.S.C. § 409(f). In any judicial proceeding seeking enforcement of a subpoena, the licensee would have the opportunity to challenge the reasonableness and propriety of the information request. In defending itself against license revocation, therefore, a licensee is certainly not precluded from challenging the scope and propriety of a request for information from a low-level Commission employee.[6] Fundamental fairness as well as Constitutional due process balks at the idea that a licensee forced into this

[6] The 308(b) letter and all of the other pre-designation correspondence on the matter from the Bureau were authored by W. Riley Hollingsworth, Esquire, who was at that time only a deputy division chief within what was then the Private Radio Bureau. *See* WTB Ex. 1.

position is precluded from asserting deficiencies and impropriety of the 308(b) letter in the ensuing hearing.[7]

B. The 308(b) Letter was Unreasonably Overbroad in its Scope.

The record fully supports the Presiding Judge's determination that the 308(b) letter was unreasonable in its scope. In essence, the 308(b) letter demanded that Kay produce virtually every document relating to his repeater business. E.g., Tr. 1030-1031, 1040-1042, 1078-1082. The request sought information for every single station licensed to Kay, encompassing more than 150 call signs, many with multiple repeater sites, throughout the Los Angeles area. Tr. 1039-1040. Kay ultimately produced over 38,000 documents in discovery, and only about 2,000 to 4,000 documents less would have been required to comply with the 308(b) letter. Tr. 2355. The overbreadth of the request prompted Kay's attorneys to seek clarification and narrowing of the request, WTB Exs. 7 & 9, which the Bureau immediately, summarily, and arrogantly[8] rejected, WTB Exs. 8 & 10.

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[7] The Presiding Judge asked Kay whether his various legal objections to the 308(b) letter had ever been addressed. Kay explained: "We never had an opportunity to litigate this. If they had given us a subpoena for the documents, we would have been able to challenge their request for the information. Basically, Your Honor, this hearing is the only legal opportunity I have had to challenge their demand for the documents under the 308(b). This is it, Your Honor." Tr. 1031. But the Commission did not issue a subpoena pursuant to Section 409 of the Act; instead, it designated a hearing pursuant to Section 312 of the Act to determine whether Kay's authorizations should be revoked. Once that formal proceeding was initiated, Kay complied with all discovery rulings of the Presiding Judge.

[8] Clearly, the Bureau had pre-determined that it was going to demand all of the requested information no matter what the burden. Kay's objections were never seriously considered. Less than 24 hours after Kay sought clarification and narrowing of the 308(b) letter, the Bureau unilaterally declared that the "request asks for basic information that Mr. Kay would have readily available if he is indeed providing communication services to customers." WTB Ex. 8 at p. 1. The Bureau had absolutely no basis for this conclusion, because it did not know anything about the manner in which Kay maintained his business records. The Bureau nonetheless arrogantly—and erroneously—assumed that "such information would be a necessity in order to even issue monthly bills to users of the many systems for which he is apparently licensed." *Id.* The record shows, however, showed that Kay was indeed serving and billing customers, notwithstanding the fact that his records were not maintained in the form the Bureau incorrectly assumed.

The Bureau contends that Kay could have easily complied with the request for loading information by providing "a user list with the number of mobiles for each user ... and invoices or other supporting documentation sufficient to support loading as of one date." *Exceptions* at ¶ 12. This is simply not true. It is troubling that the Bureau unilaterally assumed this before the hearing, rather than give good faith consideration to Kay's requests for clarification and narrowing of the scope of the request. But for the Bureau to assert this now, notwithstanding the contrary record evidence, is grossly irresponsible and is merely another example of the Bureau's willingness to abdicate truth and propriety in its lust to bring Kay down.

The 308(b) letter sought the business records that documented or corroborated the loading on Kay's various repeaters. Kay did not maintain records that provided historical data regarding the number of units assigned to each particular repeater, nor was he required by any rule to do so. To provide the requested information, Kay examined and produced a number of different documents in addition to billing records, including the customers' repeater contracts, invoices for radios, work orders for programming radios, etc. The 308(b) was seeking information for each and every one of Kay's more than 150 call signs, even stations that are not subject to loading requirements. This was a daunting task.[9] When essentially the same information was provided in discovery, it amounted to more than 30,000 documents. After Kay produced these documents, the Bureau ignored them, unilaterally choosing to focus solely and exclusively on the billing records—even though the billing systems was not designed to track system loading and, in fact, did not provide a complete or accurate picture of loading.

The Bureau made an unlimited and burdensome request for information. The Bureau refused to clarify the request. Although the request was ostensibly prompted by complaints, the

[9] The Bureau's assertion that it was seeking less information in the 308(b) letter than is typically sought by the Commission in FCC Form 800I is disingenuous. The Commission does not send an 800I seeking information as to each and every station issued to a licensee. It is rather directed to a particular station as to which the Commission has some question.

Bureau also refused to reveal the specific allegations of any such complaint or to narrow the scope of the request only to the matters complained of.[10] The Bureau instead stubbornly maintained its original 308(b) letter, the practical effect of which was to require Kay to produce virtually all documents related to his repeater operations. While Kay does not question the authority, or even the obligation, of the Commission to investigate complaints of regulatory violations, this does not confer upon the Bureau "the investigatory authority "to require [licensees] to bare their records, relevant or irrelevant, in the hope that something will turn up." *Stahlman v. FCC*, 126 F.2d 124, 128 (D.C. Cir. 1942).

The Bureau attributes some ominous significance to the fact that "Kay explained that it was easy for him to move customers from one system to another." *Exceptions* at ¶ 14. In making the unfounded assertion that Kay would repeatedly engage in a wholesale shifting of customers in order to dupe the Commission,[11] the Bureau thus admits that (a) it had already pre-judged Kay's veracity before he had even responded to the 308(b) letter; and (b) the Bureau based its refusals to clarify and narrow the scope of the request on that pre-judgment.[12] Moreover, this

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[10] The so-called complaints were later produced in discovery, *Wireless Telecommunications Bureau's Response to Kay's First Set of Interrogatories* (served on March 8, 1995), but not a single one of the complainants was presented as evidence at hearing, and not a single one of the complainants was called by the Bureau as a witness. Indeed, the Bureau refused to provide information on the whereabouts of one of the alleged complainants, a "William Drareg" of "William Drareg & Associates." This was not surprising in that the complaint was a sham—neither Mr. Drareg nor his company actually existed. Kay had on several occasions called this to the Bureau's attention, but not only did the Bureau ignore Kay, it proceeded to rely on the falsified complaint from a nonexistent fantasy man as part of its justification for initiating revocation proceeding against Kay.

[11] There is absolutely no evidence in the record that Kay has ever shifted customers from one system to another in order to falsify loading. The Bureau's burdens of proceeding and proof are not satisfied by simply speculating about what is possible.

[12] The Bureau's post hoc rationalization that it could not limit the request to specific call signs because of its apprehension that Kay is "capable of moving customers from station to station and then substantiating loading on the channels at issue," *Exceptions* at ¶ 14, belies the Bureau's contention that Kay could have complied with the 308(b) letter by simply supplying "a user list." If the Bureau could not trust Kay to accurately report his loading in response to a narrow request, we have only the Bureau's after-the-fact, self-serving statement that it would have deemed a user list compiled and produced by Kay sufficiently reliable.

suggestion reveals the Bureau's apparent total ignorance of the realities of SMR operations. While it is relatively easy to move customers as a technical matter, this does not lead to the conclusion that it would be easy to do so from an operational or business matter. Customers are placed on systems based on their needed coverage and other service requirements. A customer is moved only as necessary to respond to changing customer needs and/or maintain the quality of service. Practical business realities, especially in an SMR market as fiercely competitive as Los Angeles, would not allow the wholesale shifting of customers at Kay's discretion or whim.

C. Kay's Post-Designation Production of the Requested Information is Relevant.

Subject to the proper exercise of his right to interpose and be heard on legal objections, Kay complied with all discovery rulings, thus producing all of the information that had been sought in the 308(b) letter. The Bureau complains that the Presiding Judge "offers no authority that a licensee's refusal to provide information during a staff investigation may be excused if the licensee provides the information pursuant to an ALJ's order after designation." *Exceptions* at ¶ 16. This argument ignores the fact that, prior to designation, Kay was never afforded an opportunity to test the propriety and reasonableness of the 308(b) letter, or to have his legitimate confidentiality concerns meaningfully heard. Kay had good reason to question the sincerity of the Bureau's promises of confidentiality. Kay produced the information when the Bureau was no longer in control but was merely a party, and he did so *after* the Presiding Judge made an affirmative determination "that the Bureau will exercise care in disclosing the information to third parties," and also directed the parties to "discuss terms of a limited and narrowly tailored protective order which will not unduly burden or impede the Bureau's preparation for trial." *Memorandum Opinion and Order* (FCC 95M-77; released March 22, 1995).

A review of the sparse precedent reveals no previous Commission case in which a licensee has been disqualified solely on the basis of its failure to respond to requests for information by the Commission's staff in an informal context (*i.e.*, not pursuant to a formal

subpoena or a discovery request in a designated hearing). Indeed, the precedent is consistent with the approach followed in the Initial Decision.

In *Carol Music, Inc.*, 37 FCC 37, 3 RR 2d 477 (1964), a broadcast licensee was disqualified primarily for its failure to comply with the terms of its authorization, making bad faith promises and representations in its renewal application, and for unlawfully relinquishing control over portions of its programming. *Id.* at ¶ 3. The Commission went on to find: "Respondent also failed and refused to file with the Commission copies of contracts, agreements and other information required to be filed by statute and rule, and thereby concealed information relevant to its operations required by the Commission," *id.*, but it is clear that (a) the information withheld by the licensee, which later was developed in hearing, turned out to be extremely incriminating, and (b) the licensee's disqualification was based on the underlying violations and noncompliance, and not exclusively or even primarily on the licensee's failure to provide the requested information. Moreover, a fair reading of the *Carol Music* decision, including the Initial Decision associated with it, shows that the licensee's refusal to provide the information was based on a determined and continuous effort to conceal the violations from the Commission. This is in sharp contrast to Kay's situation in which (a) his pre-hearing responses were accompanied by *bona fide* legal objections; (b) there were extenuating circumstances preventing a complete and timely response; (c) he subsequently produced all of the material requested during discovery; and (d) the full evidence later developed at hearing did not reveal any instances of serious transgressions.

In *Warren L. Percival*, 8 FCC 2d 333 (1967), a Citizens Band licensee, who had apparently obtained his authorization using a false name, refused, on asserted Constitutional grounds, to respond to a Commission inquiry whether he had been convicted of a crime. The license was summarily revoked after the licensee failed to timely respond to an order to show

cause. In this case, Kay timely responded to the order to show cause (*i.e.*, the *HDO*), and has provided all of the requested information.

In *Faith Center, Inc.*, 9 FCC.2d 756 (Rev. Bd.) 82 FCC 2d 1, 48 RR 2d 709 (1980), *aff'd sub nom. Faith Center, Inc. v. FCC*, 679 F.2d 261 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983), the licensee's renewal application, which had been designated for hearing, was dismissed for numerous and repeated refusals to comply with discovery requests and valid discovery orders of the Presiding Judge, even after numerous objections had been ruled on and rejected by the Presiding Judge, the Review Board, and the Commission. We have nothing approaching that in this case. Kay, through counsel, interposed legal objections to the production of some of the information requested by Bureau staff in an informal investigation prior to designation. The Bureau responded by seeking and obtaining, on an *ex parte* basis, a hearing designation order seeking revocation of Kay's licenses. Kay has fully complied with all valid discovery requests and orders during the course of the hearing, and all of the information sought in the initial 308(b) letter that it is within Kay's power to produce has been provided to the Bureau.

D. The Consideration of Extenuating and Mitigating Circumstances was Proper.

(1) Confidentiality Concerns

Kay was justified in his apprehension that the Bureau would not adequately protect the confidentiality of any information he produced in response to the 308(b) letter. The Bureau's simplistic answer is that Kay's confidentiality concerns are without merit because the Bureau, in a May 27, 1994, letter (WTB Ex. 10) wrote that it had "no intention of disclosing Kay's proprietary business information, except to the extent we would be required by law to do so." *Exceptions* at ¶ 17. But the Bureau's ***deeds*** far outweighed any reassurance those words might otherwise have given. The two most significant Bureau actions that raised Kay's confidentiality concerns to an exacerbating level were: (a) the unexplained demand for 50 copies of the information after Kay's legal counsel placed copyright notices on submissions in connection

with the 308(b) letter; and (b) specific actions of Bureau personnel, in particular the actions of Anne Marie Wypijewski, a Bureau staff member actively involved in the investigation and the 308(b) letter, that confirmed Kay's suspicions.

In the initial response to the 308(b) letter, Dennis C. Brown, Kay's legal counsel, requested confidentiality. On March 1, 1994, the Bureau responded by a letter (WTB Ex. 349) that Both Kay and his legal considered a denial of that request. Tr. 1028-1029; WTB Ex. 3 at p. 5. Although the Bureau held open the possibility that Kay could submit a formal request for confidentiality pursuant to Section 0.459 of the Rules, Kay understood that this request would have to be accompanied by the very materials he was seeking to keep confidential. Tr. 1029-1030. He was very much concerned about a process that required him to submit all the documents and then have the Bureau staff make an after-the-fact determination as to which documents would be publicly released. Tr. 1030-1031. Accordingly, two letters submitted by Kay's counsel on April 7, 1994, included copyright notices across the bottom of each page, stating as follows: "Entire contents copyright, James A. Kay, Jr. 1994. All rights reserved. No portion of this document may be copied or reproduced by any means." WTB Exs. 2 & 3.

On May 11, 1994, a month after Brown's April 7 letters containing the copyright notice, the Bureau wrote a letter directly to Kay stating that information was required in response to the 308(b) letter before the Commission could process certain of Kay's pending applications. WTB Ex. 4. The Bureau stated: "Please be advised that if you claim copyright protection in your response, we require that you file 50 copies of your response ... as well as a full justification of how the copyright laws apply, including statutory and case cites ...." *Id.* Just two days later, on May 13, 1994, the Bureau sent a virtually identical letter directly to Kay, making the same request in connection with another pending application and containing the same language requesting 50 copies if Kay sought copyright protection for his response. Kay Ex. 49. Kay was

extremely concerned because the 308(b) letter was seeking "literally the entirety of the most confidential information of my company." Tr. 2342.[13]

On May 17, 1994, Brown responded to the Bureau's May 11 and May 13, 1994, letters, WTB Ex. 5, and specifically challenged the Bureau on the request for 50 copies:

> We respectfully note that we have filed the number of copies of Mr. Kay's response which are required to be filed by Section 1.51 of the Commission's Rules. However, you have requested 50 additional copies .... Since the Commission could not possibly require 50 copies for its own internal use, the only reasonable conclusion is that the Commission intends to make further circulation of Mr. Kay's response beyond the Commission. It was specifically to prevent such distribution that ... that Mr. Kay requested confidentiality for his response and provided the Commission with notice of his copyright.

WTB Ex. 5 at p. 1. The Bureau ignored this objection. In a letter dated May 26, 1994, Brown again asserted that the "request that [Kay] submit 50 copies ... clearly indicates [an] intent to disclose information to a substantial number of members of the public, even though Kay has not received notice ... that any person had requested the information." WTB Ex. 9 at pp. 2-3. Brown expressly and specifically asked for comment and clarification as to this point. *Id.* at p. 3. The next day, on May 27, 1994, the Bureau, wrote a response to Brown. WTB Ex. 10. While addressing various other points raised in Browns May 26 letter, the Bureau neither acknowledged nor answered Browns pointed and explicit expression of concern and request for clarification as to the demand for 50 copies of Kay's responsive materials. *Id.*

The Bureau's persistent demand for 50 copies of the material disturbed Kay and made him extremely apprehensive that the information would find its way into the hands of his competitors. Kay "was totally incredulous." Tr. 2344. He explained:

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[13] Kay's confidentiality concerns did not arise in a vacuum. Shortly after Kay received the Section 308(b) letter, he became aware that his competitors had copies of it and were showing it around the Los Angeles mobile radio community. Tr. 2498-2499. The Bureau had sent blind carbon copies of the Section 308(b) letter to at least six different individuals who were competitors, customers, and/or potential customers of Kay. Tr. 2497-2498; Kay Ex. 62. Kay's competitors were already using the letter against him, and he knew they would certainly attempt to get their hands on any information he produced in response to it.

> I knew of no reason whatsoever why the Commission would ever want 50 copies of the most confidential information of my company for any other purpose but to distribute it. We had asked for confidentiality, they had refused it. When we said we were going to copyright it, now they want 50 copies of it. ... What could they possibly want 50 copies for, but to give it to exactly everybody I didn't want to have it? My competitors who are public and who knows who, anybody conceivably that asked for it. I just couldn't do that. It was extraordinary. I was flabbergasted and dismayed. Tr. 2344-23245.

Tr. 2344-23245.

Competitive considerations were not the only basis for Kay's confidentiality concerns. In addition to seeking the identity and contacts for Kay's customers, the Bureau was also seeking information regarding the configuration of the customers' systems. Kay believed he had a duty to his customers, over and beyond his own self-interest, to hold such information in the strictest confidence. He testified as follows:

> The release of that information to the public would not only adversely affect my company, but my customers, as well. It is -- radio shops just do not release the system configuration of their customers' radio systems to the public. It's like releasing private citizens' cellular telephone numbers. It's just simply not done.
>
> The consequences to my company would be direct and economic. It would probably ruin my company. My customers expect me to maintain confidentiality of their records and their system configurations. I can't just release customers' information to the public. Can you imagine the liability of releasing an armored transport company's frequency codes to the public? All it takes is one robbery where the bad guys know the frequency information and there's big trouble.
>
> The same goes with alarm response companies and armed guard companies. We just cannot release that information to the public under any circumstances. To do so would endanger lives and property of my customers, their employees, and the liability to my company would be incredible.

Tr. 2342-2343.

In April 1994, before Kay's response to the 308(b) letter was due, an event occurred that increased Kay's suspicions and apprehension that the Bureau staff was acting in bad faith. At the time of the 308(b) letter, Kay had pending before the Commission a request pursuant to the Commission's "finder's preference" program in which he was seeking a dispositive preference for a frequency that had been abandoned by another licensee, Thompson Tree Service. The

purpose of the finder's preference program was to promote efficient spectrum utilization by encouraging licensees to locate unused authorizations. Such "finders" were rewarded with dispositive preferences allowing them to apply for the abandoned channel without being subject to competing challenges. Tr. 2345-2346.

Kay had previously written to the Bureau explaining that the Thompson Tree facility had been abandoned, and informally asking that the authorization be purged in accordance with the FCC's rules. He later filed the formal finder's preference request when the Bureau did not act on his informal request. In response to Bureau inquiries, Thompson Tree admitted that it had stopped using the station more than two years earlier, but expressed a desire to nonetheless retain the license in order to preserve the investment they had in the station. Kay thereupon contacted Gail Thompson of Thompson Tree and reached an accommodation with her whereby Thompson Tree would acquiesce in the cancellation of its license and Kay would provide it with repeater service so they would not lose their investment in their radio system. Tr. 2347

About a week to ten days later, Gail Thompson called Kay to report that she had just received an unsolicited telephone call from Anne Marie Wypijewski, the Bureau staff person handling Kay's finder's preference request. Wypijewski advised her that the Bureau had no choice but to cancel the Thompson Tree authorization and would be doing so shortly, but that Thompson Tree could immediately reapply for the authorization. Wypijewski did not formally advise Kay of the denial of his finder's preference request until about a week after her telephone call to Gail Thompson. Tr. 2347, 2547.

Kay viewed Wypijewski's actions as a blatantly improper maneuver which destroyed any confidence he might otherwise have had that information he provided to the Bureau would be held in confidence or that the Bureau was acting in good faith. As he explained:

> This was equivalent to a judge -- because Anne Marie is decision-making staff acting, in fact, as a judge, weighing our finder's preference, releasing what she's going to do, how she's going to rule, before she releases the ruling, to tell Mrs. Thompson how to beat the

> effect of the ruling, to literally take from me that which I had reported in good faith to the Commission and had filed as a finder's preference. It was, to me, a direct stab at me to take away that which I had worked for, that I had in accordance with the rules, properly filed and was, in fact, an invalid license. She was taking away from me that which I had worked for and was doing it without notifying me ...
>
> I was thoroughly of the opinion it was highly improper if not what they call *ex parte* representation made. This wasn't Mrs. Thompson calling in to check on something. This was Anne Marie going out of her way to tell Mrs. Thompson how to beat James Kay on a perfectly legitimate finder's preference and a perfectly legitimate report that Mrs. Thompson's license is canceled automatically. It was a way of sticking me and to help Mrs. Thompson and it just plain was wrong. ...
>
> I can't trust the Commission to play by the rules and maintain confidentiality, but going out of their way to make telephone calls to tip people off how to beat me, with pre-release of decision material, how can I trust them?

Tr. 2349-2350. Thus, the Bureau is way off base when it complains that the *Initial Decision* "does not suggest what further step was required to assuage Kay's concerns regarding confidentiality," *Exceptions* at ¶ 17, because it was precisely the "steps" the Bureau was taking which caused and confirmed Kay's confidentiality concerns.[14]

[14] Apart from the improper communications by Wypijewski, Kay viewed the denial of his finder's preference request in and of itself as yet a further indication of the Bureau's bad faith. The Bureau denied the request on the stated ground that the station was already the subject of an investigation at the time it was filed. Tr. 2526. Kay was knowledgeable of the finder's preference procedures, having filed between eight and fifteen such requests during his career. Tr. 2547. He understood that the policy of denying a finder's preference request on the basis of an existing investigation is intended to prevent a licensee from taking advantage of investigatory and enforcement work already undertaken by the Commission. In other words, the rationale of the finder's preference program is to encourage licensees to seek out fallow channels and then reward them for their efforts—not to allow them to simply piggy back on somebody else's work. Tr. 2548-2549. But in this case the ostensible "existing investigation" was nothing more than the informal letter Kay himself had previously filed calling the matter to the Commission's intention. Tr. 2525, 2549-2550. Kay had never heard of a finder's preference being denied on the sole ground that the party requesting the preference had already informally brought the matter to the Commission's attention prior to formally submitting the request. (And nothing in the rulemaking order cited by the Bureau, *Exceptions* at p. 10 n.6, suggests that the Commission ever intended such an absurd and illogical interpretation.) In Kay's words: "It was unique. I think to this day it remains unique." Tr. 2550-2551.

(2) The Northridge Earthquake

The Bureau denies the relevance of the earthquake because Kay allegedly never sought an extension of time in 1994 based on the earthquake. *Exceptions* at ¶ 18. This is not probative. The issue is not whether the earthquake was cited as a justification for an extension, but rather whether the earthquake in fact adversely affected Kay's ability to respond. The record evidence on this point is legion, see *Kay's Proposed Findings of Fact and Conclusion of Law* (hereinafter "*Kay PF&C*") at ¶¶ 57-67, and the Bureau has not refuted any of it.

Kay received the 308(b) letter only two weeks after the Northridge earthquake, a devastating natural disaster that did substantial damage to his business and his personal residence. He was understandably preoccupied with earthquake recovery, and left the details of dealing with the 308(b) letter to his Washington, D.C. communications counsel. Several of Kay's employees and even one of his local attorneys testified as to the effect the earthquake had on Kay's state of mind. He was distracted, preoccupied, and had difficulty focusing his attention. In other words, Kay behaved as any person would who has just gone through a serious natural disaster and had his life turned upside down. Clearly he did not exercise the degree of oversight, much less anything approaching detailed supervision, over his communications counsel as he might have under different circumstances. *Id.*

The earthquake also directly affected Kay's literal and physical ability to respond to the 308(b) letter. His offices were a shambles. Computer damage prevented him from having complete access to computer records. Indeed, the record reflects that it took Kay's staff two to three months to manually reconstruct the computer database. Kay also did not have extensive personal availability or access to staff support in the weeks and months immediately following the earthquake. The record establishes that Kay did not have the computer capability to provide the Bureau the information it sought. In this regard, the program Kay utilized did not keep the information in the configuration the Bureau wanted. After designation, Kay modified the

program to provide the Bureau with the requested information. It is questionable whether Kay had to go to these extremes prior to designation or, for that matter, even after designation. The Commission has no prescribed format for how licensees must maintain loading records, and may therefore not fault Kay because the records he maintained in his normal business practice did not satisfy the Bureau's *ad hoc* expectations and demands. *Id.*

The Bureau's observation that Kay's failure to produce requested materials continued to June 1994, five months after the earthquake, *Exceptions* at ¶ 18, does not negate the Presiding Judge's reliance upon the earthquake as a significant extenuating circumstance. First, the overwhelming and unrefuted (indeed, unchallenged) evidence regarding the impact of the earthquake included the facts that aftershocks continued for as long as six months following the main quake, Tr. 1684-1685, 1688, 2344, and that Kay and his limited staff have still not fully recovered from the earthquake to this day, Tr. 2516-2517. In response to discovery requests, Kay produced virtually all of the same information requested in the 308(b) letter. The task required more than three of his staff to devote almost three months to nothing but this project, and it also required 40 to 60 hours of his personal time to compile the information. And this was all done in 1995, after he had "more or less" put the company back together after the earthquake. Kay ultimately produced over 38,000 documents to the Bureau in discovery, and he estimates that only 2,000 to 4,000 documents less would have been required to comply with the 308(b) letter. Tr. 2355. Kay stated that during the weeks and months following the earthquake, it would have been literally impossible to have complied with the Section 308(b) letter, because he had no staff, no personal availability, and everything was in total disarray. Tr. 2355-2356. The Commission also conveniently ignores the fact that, by June 1994, Kay's confidentiality concerns were at their highest, the Wypijewski incident having just occurred in April 1994.

III. LOADING/CHANNEL SHARING ISSUE

The Bureau's entire case under the so-called "loading" issue comes down to its assertion that Kay failed to amend his authorizations for one or more Subpart L (470-512 MHz) or Conventional SMR (800 MHz) stations to reflect alleged reductions in actual loading. The Bureau contends that by failing to amend his authorizations to reflect alleged reductions in the number of mobile units served, Kay maintained exclusive status on various channels, thereby thwarting the Commission's requirement that unused channel capacity be shared with other licensees. *Exceptions* at ¶¶ 19-26. The Bureau argues that Sections 90.127(c), 90.135(b), 90.313(c), and 90.633(b) of the Rules, 47 C.F.R. §§ 90.127(c), 90.135(b), 90.313(c) & 90.633(b) (1994), read together, required Kay to amend an authorization the moment a mobile unit was removed from service, even if he had a good faith intention of refilling the slot in the near future.

Kay is a commercial mobile radio service licensee, acting as a private carrier with respect to his Subpart L (470-512 MHz) systems and an SMRS operator with respect to his 800 MHz systems. Licensees providing commercial service to unaffiliated third parties will necessarily experience an ebb and flow of demand for service. That loading may momentarily drop below a specified level surely must not be construed as immediately and irrevocably decimating the scope of the licensee's authorization. A rule of reason must apply, so that the shortfall is permanent or of a sufficiently long time to reasonably justify destroying any exclusive status.

A careful search of reported cases indicates that the Commission has never directly addressed the question of how soon after a change in actual loading a commercial operator must amend, but clearly a rule of reason must apply. Kay respectfully submits that Section 90.157 of the Commission's Rules already provides the solution to this dilemma. That rule provides:

> A station license shall cancel automatically upon permanent discontinuance of operations. Unless stated otherwise in this part or in a station authorization, for the purposes of this section, any station which has not operated for one year or more is considered to have been permanently discontinued.

47 C.F.R. § 90.157 (1998). Application of this rule would require a commercial operator required to amend its authorization (in cases where 90.135 is applicable) if the drop in the actual mobile count is permanent. If the drop is temporary, which is typical of commercial service providers, the licensee would only be required to amend after one year.[15] Any other interpretation leads to the absurd result that immediate amendment is required for the temporary loss of a few units, but the entire station may be shut down a year without any amendment.

The Bureau has not demonstrated Kay's mobile count ***ever*** fell below the authorized level, much less that it ***permanently*** did so. The incomplete numbers relied upon by the Bureau are from 1995, less than a year after a devastating earthquake, during a time of general downturn in the Los Angeles local economy, and at a time when Kay was overwhelmed with legal and regulatory problems. It would not be remarkable to discover that Kay's loading might be "off" at this time—but that is hardly a showing that he had permanently discontinued service to the authorized number of mobiles. The record supports Kay's contention that at all relevant times he had on hand an adequate number of radios to cover his loading requirement, and the rules do not require that each one of those radios be in service continuously at all times.

The Bureau attempts to finesse the loading issue by lumping together numerous call signs and then arguing that Kay's overall loading on these call signs is less than the aggregate number of authorized mobiles. *Exceptions* at ¶ 22 & n.9. The Bureau first lists 18 call signs for which it asserts that Kay has reported no loading. *Id.* at p. 12, n.9. The Bureau conveniently neglects to mention that 11 of these call signs represent facilities for which the loading is reflected on other

[15] The Bureau concedes that Section 90.157 can and does operate to cancel only part of an authorization. See *WTB PF&C* at ¶¶ 241-242. The Bureau there explains that Section 90.157 can operate to cancel a base station portion of a license but not the mobile portion of the license. So there is nothing remarkable about suggesting that Section 90.157 operates to automatically cancel the authorization for some or all of the mobiles on a license.

co-channel sites.[16] The Bureau includes in the group of 19 call signs stations for which Kay admitted that the base stations were never constructed and for which mobile usage would therefore not be reflected in billing records,[17] stations that are "trunked" with other channels for which loading is reported elsewhere for the entire trunk group,[18] stations for which the authorized number of units is extremely low and the channel is in fact shared with other licensees and therefore used by Kay primarily for rental and demo units that are not reflected in the billing records,[19] and at least one station operating below 470 MHz, a band that is not assigned on an exclusive basis and for which no loading requirements of any sort apply.[20]

The Bureau next lumps together several call signs for which it claims that the reported loading is substantially less than the number of authorized units. *Id.* at p. 13, n.9. The Bureau continues to maintain that Kay's billing records equate with his loading records, and this is not the case. Kay's billing system was not designed for the purpose of recording or tracking system loading, and the billing records therefore do not accurately or comprehensively reflect system

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[16] Thus, the loading for call signs WIK310, WIK331, WIK376, WIL235, WIL256, WIL342, WIL350, WIL441, WIL372, WIL392, and WNYQ437 is reflected on the records for co-channel stations at other locations under call signs WII755, WEC934, WIJ992, WIH339, WIF759, WIK294, WIH868, WIJ343, WIH872, WIK896, and WNKV762, respectively. In many cases, the loading is reflected on the billing records for a co-channel site for which the customer was specifically billed, but the customer was provided with access to the additional site at no extra charge, which was not reflected in the billing records. E.g, Tr. 1006, 1014-1015, 1096-1098. In addition, some of these represent two different call signs covering the same piece of physical hardware, with the billing therefore being recorded on only one call sign. E.g. Tr. 1096-1097. While it is impossible to recount in the 30 pages allotted for reply exceptions, a review of the hearing transcript will show that Kay adequately answered and explained virtually every apparent instance of non-loading or underloading with which the Bureau confronted him. Nonetheless, in its disingenuous desperation to paint a false picture of Kay, the Bureau simply ignores the evidence.

[17] E.g., WIL653 and WIL659. The Bureau simply ignores the conclusive showing made that, even if Station WIL659 had not been surrendered for cancellation, its issuance to Kay did not in any way significantly preclude sharing on the channel. *Kay's Reply to the Wireless Telecommunications Bureau's Proposed Findings of Fact and Conclusion of Law* (hereinafter "*Kay Reply F&C*") at ¶ 23.

[18] E.g., WIL372 and WNYQ437.

[19] E.g., WIL625, WIL665, WIL653, and WNMY773.

[20] E.g., WNQK959.

loading. Tr. 1006-1010, 1017-1018, 1038, 1047-1050, 1070-1074, 1082-1083. It was for this reason that Kay produced well over 30,000 pages of documents in discovery, including not merely the billing records, but also the customers' repeater contracts, invoices for radios, work orders for programming radios, etc. Although the Bureau had access to all of this information for years, and had every opportunity to seek any additional information, the Bureau nonetheless ignored all of these records and instead myopically focused exclusively on the billing records which admittedly do not reflect all of the mobile usage.

IV. ABUSE OF PROCESS

The record contains extensive factual basis for Kay's good-faith belief that each of the individuals put forth by the Bureau as alleged shills either were engaged in or intended to engage in pursuits beyond the scope of their employment by Kay in which they desired to use Kay's radios and repeaters. See *Kay PF&C* at ¶¶ 102-104, 111, 122. In these circumstances, prior to October of 1992, it would have been unlawful for Kay to have permitted these individuals to operate radios on his system for their own outside pursuits unless such operations were licensed. The credibility of the witnesses against Kay ranges from highly questionable to non-existent. . See *Kay PF&C* at ¶¶ 105, 113, 119-120, 125, 129, 104; *Kay Reply F&C* at ¶ 31. Both Hessman and Jensen were found to have made misrepresentations under oath before the Office of Appeals of the California Unemployment Insurance Appeals Board regarding the circumstances of their discharge from Kay's employ. Cordaro tells inconsistent stories. At hearing he denied having obtained an authorization in pursuit of an independent business activity; but in 1992 he signed and submitted to the Commission a declaration, under penalty of perjury, attesting to the opposite. WTB Ex. 351 at pp. 2 & 5. Also, the evidence adduced indicates that Cordaro further misrepresented to the Bureau during the investigation, to Kay during discovery, and to the Presiding Judge and the Commission during the hearing regarding the facts and circumstances surrounding computer files he removed from Kay's system. All three of these men have reason

to dislike Kay and are clearly biased against him. Their testimony can not be taken at face value. There is also reason to question the reliability, if not the credibility, of Carla Pfeifer, and the Bureau has failed, in any event, to show that Kay would have had any motive for using Pfeifer as an application shill. See *Kay PF&C* at ¶¶ 132-137; *Kay Reply F&C* at p. 18 n.22.

The Bureau asks the Commission to ignore these serious credibility and reliability concerns on the dubious theory that the testimony of the witnesses was arguably consistent, *Exceptions* at ¶ 29. Even if this were true, it does not overcome the serious credibility problems of each witness. (Indeed, the Bureau itself does not sincerely believe that consistency of story is adequate to render testimony acceptable as true, for if it did it would have recommended resolution of the lack of candor issue in Kay's favor on the theory that the testimony of Kay and Sobel were consistent.) Presenting decidedly incredible and biased witnesses who tell incomplete stories, and then attempting to weave that into vague accusations does not qualify as discharging Bureau's burdens of proceeding and proof.

Amazingly, the Bureau charged Kay with preparing and filing false applications, but in many cases it did not even bothered to place copies of the applications in evidence. In the cases of Jensen and Cordaro, for example, the Bureau offered only copies of the resulting licenses, but Kay forthrightly admitted that he probably prepared or assisted in the preparation of the applications. There is no evidence that Kay in any way concealed his involvement. In the Roy Jensen end user application, for example, Kay's name and the call sign of Kay's associated station were handwritten (most likely by Kay) on the application. WTB Ex. 306 at p. 3. And the contact phone number provided at two different places on the application is a business number that rings at Kay's offices. WTB Ex. 306 at p. 1.

The Bureau's criticism of the Presiding Judge for considering Kay's lack of motive for the alleged abuse of process, *Exceptions* at ¶ 32-33, is misplaced. Contrary to the Bureau's contention, the Presiding Judge did not hold that motive is a requisite element of abuse of

process. Rather, the Presiding Judge correctly considered Kay's lack of motive as a factor in weighing the evidence and coming to a decision. Kay explicitly testified that he could have easily applied, in his own name, for the Castro Peak license held by Carla Pfeifer had he so desired, Tr. 2432-2433, and the Bureau has not contradicted this. The record indicates that most, if not all, of the management agreement station licenses held by Marc Sobel were, at the time he obtained them, on encumbered channels, *e.g.*, WTB Ex. 229 at pp. 198-199, so they could just as easily have been filed for by Kay. The Bureau has not disputed this. Kay demonstrated that, if he had desired to apply in his own name for the Rasnow Peak authorization held by Cordaro, he would have been able to do so by simply demonstrating a need for only 9 mobile units, based on an analysis of the loading environment on the channel at that time. Tr. 2479-2483. The Bureau has not disputed this.[21] Kay explained that he was adept at obtaining licenses on encumbered channels in his own name in circumstances where there were existing users already on the channel. *E.g.*, *Kay PF&C* at ¶ 100.

Abuse of process, especially the particular manifestation of it alleged here, is a very serious charge. It can not be supported by mere speculation. It was incumbent upon the Bureau to prove that Kay did the acts it alleges. Accepting arguendo the Bureau's assertion that motive is not a requisite element of the offense, it is nonetheless incumbent on the Bureau—the party with the burden of proof—to show motive where its sole evidence rests on the questionable testimony of biased and incredible witnesses, and where Kay has affirmatively and substantially demonstrated lack of motive. Boiled down to its essence, the Bureau has offered nothing more than a general and hypothetical tutorial on how an unscrupulous SMR operator *might* use sham

[21] While there was no evidence offered at trial, the Commission may also take official notice of the fact that the authorization held by Gales, Call Sign WPFF295 at Heaps Peak, is co-channel to and short-spaced with Trunked SMR Station WNPJ874 operated by Kay at Mount Lukens. Heaps Peak, being only 65 miles from Mount Lukens, is well within the 105 mile protection area for Station WNPJ874. Thus, there would have been no need for Kay to have used Gales as a shill if he wanted to apply for this channel in his own name at Heaps Peak.

applications to his benefit. In the face of substantial evidence that Kay could not benefit in any way in these particular cases, it was most definitely incumbent upon the Bureau to show Kay's motive. Mere self-serving speculation does not satisfy the Bureau's evidentiary burdens, and it certainly does not support the draconian sanction of license revocation.

V. SOBEL ISSUES

The Bureau contends that Kay misrepresented facts and lacked candor[22] in the *Motion to Enlarge, Change, or Delete Issues* (submitted in this proceeding in January 1995) because he did not disclose therein full details regarding his business relationship with Marc Sobel, and he affirmatively misrepresented that he had no "interest" in Sobel's stations and that Sobel was not an "employee" of Kay. The *sine qua non* of disqualifying misrepresentation or lack of candor is a fraudulent or deceptive intent. *Leflore Broadcasting v. FCC*, 636 F2d 454, 461 (D.C. Cir. 1980); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1196, 59 RR 2d 801 (1986); *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129, 53 RR 2d 44 (1983). The record does not support a finding of any intent to deceive on the part of Kay.

In determining whether there was an intent to deceive, the Commission must consider the context and purpose of the January 1995 pleading in question. The *HDO* in this proceeding

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[22] Misrepresentation is a false statement of material fact, while lack of candor is a concealment, evasion, or other failure to disclose a material fact. *Fox River Broadcasting, Inc.*, 93 FCC2d 127, 129, (1983). "A necessary and essential element of both misrepresentation and lack of candor is intent to deceive." *Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd. 12020, 12063 (1995). *See also Weyburn Broadcasting Limited Partnership v. FCC*, 984 F.2d 1220, 1232 (D.C. Cir. 1993); *Garden State Broadcasting Limited Partnership v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1196 (1986); *Fox Television Stations, Inc.*, 10 FCC Rcd. 8452, 8478 (1995); *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Abacus Broadcasting Corp.*, 8 FCC Rcd. 5110, 5112 (Rev. Bd. 1993); *Pinelands, Inc.*, 7 FCC Rcd. 6058, 6065 (1992). Inaccuracy due to carelessness, exaggeration, faulty recollection, *etc.*, do not suggest the deceptive intent normally required for disqualification. *See MCI Telecommunications Corp.*, 3 FCC Rcd. 509, 512 (1988), *citing Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979); *Standard Broadcasting, Inc.*, 7 FCC Rcd. 8571, 8574 (Rev. Bd. 1992). Indeed, it is the "willingness to deceive" that is most significant. *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946).

initially contained an error based on a misunderstanding by the Commission of the pertinent facts. The Commission stated in the *HDO*: "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions .... We believe these names include some or all of the following: Air Wave Communications [and] Marc Sobel dba Airwave Communications." *Kay HDO*, 10 FCC Rcd at ¶ 3.[23] The *HDO* did not state that the Commission was inquiring into the relationship between Sobel and Kay, but rather the Commission erroneously believed Sobel was a fictitious name being used by Kay. It was this error that Kay sought to correct through the January 1995 pleading, and the statements made therein must be understood in that context. When Kay submitted the pleading, his mind was not focused on the specifics of the management agreement, nor was it focused on whether the arrangements by which he manages stations of other licensees constituted unauthorized transfers of control.[24] His mind was focused on correcting the erroneous listing of several of Sobel's call signs as being stations licensed to Kay. That was the purpose of the filing, and what Kay intended when he submitted the January 1995 pleading must be understood in that context.

The Bureau's "showing" under this issue amounts to little more than quibbling with Kay over what he meant by the use of the words "interest" and "employee" and the phrase "stations or licenses." Kay has testified as to what he meant by these words, and his explanation is entirely reasonable and credible. There is no inconsistency between the challenged Kay statement and the facts. The Bureau is attempting to rest an entire charge of misrepresentation and lack of candor on arguable interpretations of words of potentially ambiguous meaning. In *Lutheran Church-*

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[23] Some of the other names listed were in fact trade names used by Kay or entities owned by Kay and through which he did business, *e.g.*, Buddy Corp., Southland Communications, and Oat Trunking. It is clear from the context that the Commission considered *all* of the listed names, including Sobel, to be Kay aliases or companies owned by Kay.

[24] Indeed, only a few months earlier, his attorneys had provided him with their standard form SMR management agreement which he was assured met all FCC requirements.

Missouri Synod v. FCC, 141 F.3d 344, 11 CR 1186 (D.C. Cir. 1998), the Court specifically rejected this approach. At issue there was whether a broadcast licensee lacked candor with the Commission in describing its hiring practices in connection with an EEO review by stating that a background in classical music was a "requirement" for certain positions when, in fact, some positions were occasionally filled by individuals with no such background. The Court reversed the Commission's imposition of a sanction for lack of candor, finding it improper for the Commission to have imposed its own interpretation of the meaning of the word "requirement" for that which the licensee itself put forward. *Id.* at Sec. III of opinion. (emphases in original). The same analysis obtains in this case with respect to the use of the word "interest". If legitimate disagreement as to the meaning of ambiguous words will not justify a modest forfeiture, it certainly will not support disqualification of a licensee and destruction of his livelihood.

Even assuming a case could be made that Kay's statement was in any way not consistent with the facts, the record amply demonstrates that there was no intent to deceive. Sobel and Kay happily operated under an oral agreement for at least two years before the written agreement was executed. It was only after Sobel saw an advance draft of the *HDO* and learned that the Commission was operating under the false impression that Sobel was a mere fictitious alias being used by Kay that he insisted on having the management arrangement reduced to writing. If it had been the intention of Kay and Sobel to conceal their business arrangement, they certainly would not have put it in writing at a time when they both knew Kay's affairs were being intensely investigated.

Only three months after the January 1995 pleading, Kay produced copies of agreements for stations he managed, including the Sobel management agreement. *Kay's Responses to Wireless Telecommunications Bureau's First Request for Documents* (March 24, 1995). The Bureau's speculation that Kay would not have produced the Sobel management agreement if the January 1995 pleading had been successful, e.g., *Exceptions* at p. 21 n.18, is contradicted by the

record. In the March 1995 discovery response, Kay produced other management agreements that had no relevance to the January 1995 pleading and that were not expressly implicated in the *HDO*. For example, it was by virtue of this discovery production that the Bureau received a copy of the management agreement between Kay and Jerry Gales. WTB Ex. 326.[25]

In any event, the nexus the Bureau attempts to fabricate between the production of the management agreement and the motion to remove Sobel's call signs from the Kay proceeding simply does not exist. This was clearly demonstrated by Sobel's testimony in the Kay proceeding and is confirmed by a review of the applicable documents. Of the eleven Sobel call signs listed in the Kay HDO, only two are subject to the management agreement.[26] Tr. 1775-1776. Kay has no

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[25] The Bureau takes issue with the Presiding Judge's criticism of the Bureau for effectively concealing the fact of the submission of the management agreement from Judge Frysiak in the Sobel proceeding. The Bureau only compounds its dishonesty, however, in attempting to argue that Judge Frysiak considered the submission of the management agreement and ruled it irrelevant. *Exceptions* at ¶ 36 & Attachments 1 & 2. The Bureau knows full well that Judge Frysiak rendered the cited ruling before the candor issue had been added in the Sobel case—indeed, before he had even considered the motion to add the issue. The Bureau's response to the cited discovery, *Exceptions* at Attachment 1, does, however, serve to highlight the Bureau's bad faith. Sobel had sought this admission to demonstrate his good faith. The Bureau objected on relevance grounds, arguing that Sobel's state of mind was not relevant. Sobel countered that the requested information was relevant because the license revocation sanction sought by the Bureau could not be imposed solely for the alleged unauthorized transfer of control in the absence of a showing of deceptive intent or other violations or bad faith by Sobel. *Sobel's Response to the Bureau's Objections to Requests for Admission* at 2-3 & n.3 (filed in WT Docket No. 97-56 on March 27, 1997). Exactly one week later, the Bureau for the first time charged Sobel with misrepresentation and lack of candor. *Wireless Telecommunications Bureau's Motion to Enlarge Issues* (April 3, 1997). The basis of that motion (as is the basis of the candor issue in this proceeding) was that the January 1995 pleading was not consistent with the management agreement. Yet, the Bureau had both the agreement and the pleading in its possession since March of 1995. It nonetheless did not recommend and the Commission did not include a candor issue when it designated the Sobel case for hearing. Only when a chink in its litigation strategy was exposed did the Bureau suddenly pretend to believe that there had been misrepresentation and lack of candor based on information the Bureau had known about for more than two years. Such exaltation of gamesmanship over truth and the public interest is an abuse of prosecutorial power and is typical of the misconduct found by the Presiding Judge. *Initial Decision* at n.49.

[26] The December 30, 1994, Radio System Management and Marketing Agreement together with the December 30, 1994, Addendum and Amendment to Radio System Management and Marketing Agreement relates to sixteen different call signs issued to Marc Sobel. (WTB Ex. No. 341). Appendix A to the *HDO* lists eleven call signs that were ostensibly held by Kay in the name of Marc Sobel. *HDO* at Appendix A, Items 154-164. Only two call signs (KNBT299 and KRU576) are common to both lists.

connection to or involvement in the other nine Sobel stations listed in the Kay HDO, with the exception that he may sublease space to Sobel for one or more of these stations in exchange for a monthly rental payment. Tr. 1778. Sobel, not Kay, provides the equipment for these stations. Sobel, not Kay, loads customers onto these stations. Sobel, not Kay, bills and collects for services provided on these stations. In short, Kay has no connection with or involvement in the ownership or operation of these stations. Tr. 1778.

At the time Kay executed the affidavit, he was advised by legal counsel that the management agreement did not constitute an "interest." Kay's reliance on legal counsel defeats the suggestion that he acted with deceptive intent. Although the Commission is reluctant to excuse violations based on the alleged failures of counsel, *see, e.g., Hillebrand Broadcasting, Inc.*, 1 FCC Rcd. 419, 420 n.6 (1986), the Commission is equally reluctant to impute a disqualifying lack of candor where there has been good faith reliance on advice of counsel. *See WEBR, Inc. v. FCC*, 420 F.2d 158, 167-68 (D.C. Cir. 1969) (good faith reliance on counsel is relevant to determining who is acting with candor); *Broadcast Associates of Colorado*, 104 FCC2d 16 (1986) (applicant who improperly certified application on advice of counsel not disqualified); *Video Marketing Network, Inc.*, 10 FCC Rcd. 7611 (1995); *Fox Television Stations*.

In *Rainbow Broadcasting Co.*, 13 CR 62 (1998), the Commission was confronted with the issue whether a violation of the *ex parte* rules by legal counsel should be attributed to the licensee and, if so, what impact that should have on the licensee's basic qualifications. The Commission opined as follows:

> Although applicants are bound by the acts of their agents, *see Carol Sue Bowman*, 6 FCC Rcd 4723 ¶4 (1991); *Hillebrand Broadcasting Corp.*, 1 FCC Rcd 419, 420 n. 6 (1986), and it is axiomatic that they are responsible for knowing and complying with the Commission's rules, these principles do not warrant disqualification of the applicant here. There is no doubt that the violations actually occurred and are attributable to Rainbow. Nevertheless, the applicant's knowledge of the misconduct is a highly relevant factor in determining whether disqualification is appropriate. *Centel Corp.*, 8 FCC Rcd 6162

(1993), *petition for review dismissed sub nom. American Message Centers v. FCC*, No. 93-1550 (D. C. Cir. Feb. 28, 1994), *rehearing denied* (May 25, 1994) (carrier not disqualified, despite multiple *ex parte* violations, where two of the violations were inadvertent and unintentional, and others involved reasonable belief contacts were permissible); *see also Voice of Reason, Inc.*, 37 FCC 2d 686, 709 (Rev. Bd. 1972), *recon. denied*, 39 FCC 2d 847, rev. denied, FCC 74-476, released May 8, 1974.

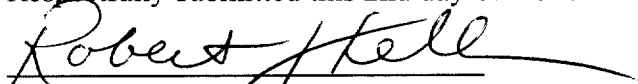
Id. ¶ 18 (underlined emphasis added).

Kay did far more than merely rely on advice of counsel—Kay's attorneys actually wrote both of the documents that form the basis of the alleged misrepresentation and lack of candor. Brown & Schwaninger drafted the management agreement that Sobel and Kay executed in October 1994 and re-executed in December 1995. Brown & Schwaninger also wrote the affidavit that Sobel, at their request, executed on January 24, 1995, less than a month after re-executing the agreement. Here, there has been no showing that Kay intended to deceive the Commission by executing the affidavit. To the contrary, it was certainly reasonable for Kay to assume that his own legal counsel would not ask him to sign, under oath, a statement that was factually at odds with another document the same attorney had also prepared for his signature. Indeed, a finding of deceptive intent would require the fantastic conclusion that Kay's own legal counsel knowingly asked him to commit perjury, and the Bureau has presented absolutely no evidence to that effect.

VI. CONCLUSION

WHEREFORE, the *Initial Decision of Chief Administrative Law Judge Joseph Chachkin* in the above-captioned matter should be affirmed in all respects.

Respectfully submitted this 2nd day of November, 1999

By: 

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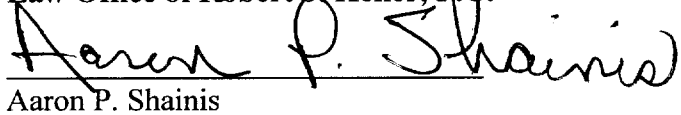
By: 

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CERTIFICATE OF SERVICE

I hereby certify that I, Michael S. Goldstein, secretary at the law firm of Shainis & Peltzman, Chartered, this 2nd day of November, 1999, had hand-delivered a copy of the foregoing pleading to the following:

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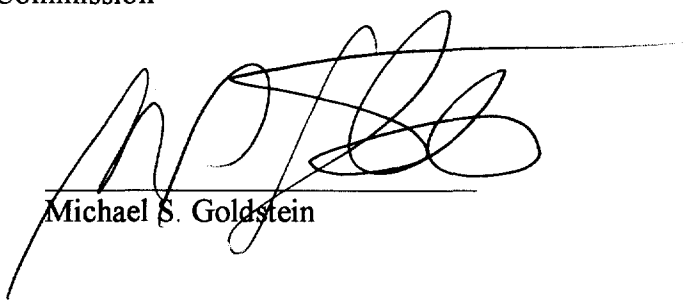

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